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No. 06-1475

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In the

Supreme Court of the United States

JOSHUA HALE; et al.,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of Interior; et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I

THE GUARANTEE OF REASONABLE AND FEASIBLE ACCESS UNDER ANILCA CANNOT BE EVISCERATED BY NEPA ANALYSIS, AS DEMONSTRATED BY HOLDINGS OF THIS COURT

The core of Petitioners' argument is that the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101, *et seq.* (ANILCA) as interpreted at 43 C.F.R. § 36.10(b), places a substantive limit on the Park Service's discretion when regulating access to private inholdings, such that NEPA review is proscribed. The government does not dispute the existence of ANILCA's guarantee of "adequate and feasible" access, but it continues to deny that those words have any meaning, relegating the Hale family to NEPA-delayed unsafe dead-of-winter access. This is not what the words of ANILCA say and not what Congress intended when it tried to ameliorate the impacts on Alaskan citizens of a massive expansion of the National Park System in Alaska.

Nor is the Hale family arguing that there can be *no* regulation of access, the government's characterization notwithstanding. Brief for Federal Respondents' in Opposition at 9.[1]

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[1] The government notes that the Hale family "refused the permit the NPS proffered." Opposition brief at 10. What the Park Service offered was a total of 9 round trips from October, 2004, to April, 2005. App. F-4, Permit. Of course, the granting of a limited number of trips during the dead of winter over a steep and icy trail was neither safe, reasonable, or feasible. While the government's further suggestion that there was a "failure to

(continued...)

Under certain circumstances not present here, for example, it might well be reasonable for the Park Service to verify an inholder's claim to ownership or the validity of an unpatented mining claim. But there is no dispute here that the Hales own the subject property. Nor are there any other reasons that would make this a special case warranting review before access.

That ANILCA's guarantee of "adequate and feasible access" proscribes NEPA review is supported by this Court's precedents in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (*SCRAP*); and *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976).

The government claims there is no conflict between these decisions and that of the Ninth Circuit below because ANILCA "expressly authorizes the Secretary to subject such access across protected lands to 'reasonable regulations,' in order 'to protect the natural and other values of such lands.'" 16 U.S.C. § 3170(b). Opposition brief at 11.

However, the Secretary's authorization to promulgate reasonable regulations does not

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[1] (...continued)
cooperate" on the part of the Hale family during the NEPA process is inaccurate, it is also beside the point. *See* Opposition Brief at 10. Under ANILCA, the Hale family has a right to access their property in a reasonable manner without the delays attendant to the preparation and review of a NEPA analysis.

countermand the mandatory duty to grant adequate and feasible access:

> ***Notwithstanding any other provisions*** of this Act ***or other law***, . . . the State or private owner or occupier ***shall*** be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes.

16 U.S.C. § 3170(b) (emphasis added). In *Public Citizen* it was a similar lack of discretion that led this Court to hold that access by Mexican trucks could not be conditioned on the preparation of an EIS:

> Importantly, FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" the applicable safety, fitness, and financial-responsibility requirements.

Public Citizen, 752 U.S. at 758-59. In other words, "it would not, therefore, satisfy NEPA's 'rule of reason' to require an agency to prepare a [NEPA analysis] due to the environmental impact of an action it could not refuse to perform." *Id.* at 769. *Public Citizen,* moreover, dealt with a NEPA-based challenge to the promulgation of regulations. That the Secretary here has the ability to develop regulations does not obviate his duty to grant access.

Nor is the government's assertion that the Secretary may promulgate regulations relevant to the support provided to Petitioners by *SCRAP*. That case plainly notes that NEPA was not intended to repeal by implication any other statute." 412 U.S. at 694.

Accord, Flint Ridge, 426 U.S. at 788. That is made obvious here with ANILCA's "notwithstanding . . . any other law" language. 16 U.S.C. § 3170(b). Not only is there no implication that NEPA repeals the later-enacted ANILCA, but ANILCA makes it obvious that ANILCA trumps NEPA when NEPA interferes with the provision of "adequate and feasible access."

Likewise, in *Flint Ridge* this Court found that the impracticality of complying with NEPA's notice and comment requirements within the time limits established by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq.*, meant that NEPA would not be applied. 426 U.S. at 791. Here, the five months it took for the government to conclude its NEPA analysis, *see* Petitioner's Appendix F, combined with the horribly crabbed access permit ultimately offered by the Park Service, demonstrates the irreconcilable conflict between NEPA and ANILCA's guarantee of "adequate and feasible access."[2] Moreover, as here, the Disclosure Act gave the Secretary no discretion—he had to issue the permit. 426 U.S. at 789-90.

In short, the Ninth Circuit's decision upholding the Park Service's decision to delay the Hale family's reasonable request to access their property for five months so that a NEPA review could be conducted is in

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[2] The five months taken here is typical: "Draft environmental impact statements on simple projects prepared by experienced personnel take some three to five months to complete, at least in the Department of the Interior." *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. at 789 n.10. The Park Service, moreover, claims that it can take up to nine months to complete such NEPA analysis. *See* Opposition brief at 5, *citing* 43 C.F.R. § 36.6(a)(1).

stark contrast to this Court's cases holding that NEPA review is not required when such review is inconsistent with other statutes or when the agency lacks discretion to deny the underlying action. These conflicts are in no way minimized by the Secretary's ability to promulgate regulations. Simply put, these conflicts warrant this Court's intervention in order to explain to the Ninth Circuit and the Department of Interior what statutory and practical limits on NEPA actually mean.

II

THE FEDERAL GOVERNMENT HAS NO POWER TO DENY THE EXERCISE OF VALID AND EXISTING RIGHTS-OF-WAY ESTABLISHED UNDER PRIOR LAW

Rights of access granted to the states under the Mining Act of 1866, 14 Stat. 253, better known as R.S. 2477 rights-of-way, may not be denied or restricted by the United States, according to the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 748 (2005) (SUWA). The access road to the Hale family's property is such an R.S. 2477 right-of-way.[3] Respondent suggests that case is inapposite because it did not involve ANILCA. The government misses the point.

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[3] The Ninth Circuit assumed, without deciding, that the road here qualified as a R.S. 2477 right-of-way, App A at A-9, and held that the Park Service could nevertheless regulate the use of the trail. The trial court likewise declined to reach the ultimate question of whether the road here did qualify under R.S. 2477, holding only that its degraded condition warranted regulation. App. D at D-10. This Court is not being asked to take this case in order to decide the status of the road, but only whether, assuming it qualifies under R.S. 2477, the Park Service can severely limit its use.

That the Hale family's access is via an R.S. 2477 right-of-way is an ***additional*** reason, ***independent of*** ANILCA, why the government may not require NEPA compliance prior to utilization of the road.[4] It is a right-of-way that, according to *SUWA*, eliminates the need of advance consultation with the relevant federal land agency if the right-of-way is not to be expanded:

> As long as the Counties act within the existing scope of their rights of way, performing maintenance and repair that preserves the existing state of the road, they have no legal obligation to consult with the BLM.

425 U.S. at 749. If the Hale family were proposing to engage in maintenance of the road, rather than simply traversing it, the Park Service would still be limited in its authority to interfere with that maintenance:

> [W]hen the holder of an R.S. 2477 right of way across federal land proposes to undertake any improvements in the road along its right of way, beyond mere maintenance, it must advise the federal land management agency of that work in advance . . . [to, if necessary], formulate alternatives.

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[4] This point is emphasized by the language of ANILCA that it is "subject to valid existing rights." 16 U.S.C. § 410hh-2. As well-stated in the *Amicus Curiae* Brief of Mountain States Legal Foundation in Support of Petitioners, this means that the Park Service's regulatory powers under ANILCA are "subordinate" and "subservient" to the rights preserved under R.S. 2477. Amicus Brief at 6-9 and 13-14. These rights are, therefore, ***independent of*** rather than ***dependent upon*** ANILCA.

SUWA, 425 F.3d at 748. But that is not the case here. What the Hale family sought permission to do was to travel with a tracked vehicle, here a bulldozer with its blade up, not for the purpose of constructing or reconstructing the road, but because that is the only type of vehicle capable of traversing the unmaintained right-of-way with a 16-foot trailer needed to bring in supplies to rebuild their home. As the family was not seeking permission to construct or expand the right-of-way, they were under no obligation to inform the Park Service of their intentions. The clear conflict between the decision below and that of the Tenth Circuit is another independent reason why the Petition for Writ of Certiorari should be granted.[5]

III

THE NINTH CIRCUIT INAPPROPRIATELY REACHED INDEPENDENT FACTUAL CONCLUSIONS THAT THE TRIAL COURT EXPRESSLY ESCHEWED FROM REACHING BECAUSE THERE HAD BEEN NO TRIAL ON THE FACTS

As explained in the Petition, the Ninth Circuit based its decision on certain factual conclusions that it reached without the benefit of a trial and after the trial court expressly declined to address those factual issues. *See* Petition at 21-23. The government responds only by saying that the Ninth Circuit based its decision on "facts in the administrative record."

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[5] The government does not respond to the additional points raised by amicus Mountain States Legal Foundation suggesting that the Ninth Circuit's decision threatens a whole panoply of established rights. That is unfortunate, for those arguments are compelling.

Opposition brief at 13. The problem with this response is that the government does not and cannot cite to anything in the administrative record that was relied upon by the Ninth Circuit when it found that the access sought by the Hale family would cause "more environmental damage" or determined that the argument that it is "more dangerous to drive in the winter—makes no sense to those experienced with conditions in Alaska."[6] The Ninth Circuit did not cite to the administrative record for these off-the-cuff *sua sponte* factual conclusions. Petitioners respectfully submit that the Ninth Circuit cannot base its decisions on factual conclusions not reached or considered by the trial court.[7]

IV

THE NINTH CIRCUIT WAS CORRECT IN FINDING JURISDICTION TO REVIEW PETITIONERS' CLAIMS

The District Court and the Ninth Circuit initially held that the courts were without jurisdiction to hear the Petitioners' claims.[8] The Ninth Circuit, however, on reconsideration reversed itself and found that it had

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[6] *See* App. at A-11 to A-12.

[7] Petitioners reemphasize that they are ***not*** asking this Court to evaluate these factual findings but only that it require the Ninth Circuit to base its findings on factual determinations that are not made in the first instance by the trial court.

[8] *See* App. C, Ninth Circuit decision of February 9, 2006, at C-5 and App. D, Order Denying Plaintiffs' Motion for a Temporary Restraining Order and Dismissing Plaintiffs' Request for Permanent Injunctive Relief, at D-15 (dismissing for lack of jurisdiction).

jurisdiction.[9] The Government argues now that the courts had no jurisdiction to review the Park Service's decision to require NEPA analysis prior to allowing access into the Park.[10] This argument is without merit.

The Hale family is not challenging the particularities of the permit process below, but of the very right of the Park Service to impose the NEPA review process in the first place.[11] As the Court below recognized, this argument "falls squarely within the collateral order doctrine."[12] The government makes the semantically challenging argument that the decision to do a NEPA analysis is "inextricably related" to the analysis itself because "NPS's review under NEPA is an aspect of its decision on the merits." Opposition brief at 14. But, if NEPA review is itself precluded, as the Hale family contends, then there is no point to even considering the results of that analysis. Nowhere in their appeal at the District Court or Ninth Circuit level have the Hales based their challenge on the content of the environmental review as opposed to the very existence of that review. The Ninth Circuit quite properly found that it had jurisdiction to review the merits of the Petitioners' claims.

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[9] *See* App. A at A-5 to A-9.

[10] It appears that the government is raising this argument only with respect to Petitioners' claims under ANILCA, not its claims under R.S. 2477 and the problem of the appellate court's having reached independent factual conclusions.

[11] *See* App. A at A-7.

[12] *Id.*

CONCLUSION

For the reasons in their Petition and above, Petitioners respectfully request that their Petition for Writ of Certiorari be GRANTED.

DATED: November, 2007.

Respectfully submitted,

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